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No._____

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IN THE

Supreme Court of the United States

October Term, 1984

MAJOR GENERAL (RET.)
JAMES F. COCHRAN, III,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, NO. 83-1285).

PETITION FOR CERTIORARI

JONES, OSTEEN, JONES & ARNOLD
CHARLES M. JONES
JEFFERY L. ARNOLD
Counselors for Petitioner
Major General (Ret.) James F. Cochran, III
206 East Court Street
Hinesville, Georgia 31313-0525
912-876-0111

CHARLES M. JONES
Attorney of Record

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

73PP

Questions Presented for Review

Whether the Trial Court properly granted a partial summary judgment without a trial or at a minimum permitting Petitioner to pursue full and adequate discovery through the use of oral deposition, and accordingly whether Petitioner was administered an Article 15 proceeding with absolute fairness in a formal and dignified manner at every stage of the proceedings as required by applicable Army Regulation.

Answered in the affirmative by the Court below.

Whether the United States Army followed established regulations and procedure when they referred for factual and judicial review Petitioner's Article 15, UCMJ Appeal to an officer inferior in rank to both Petitioner and the Commander imposing punishment without determining whether an intermediate superior authority was reasonably available to take action.

Answered in the affirmative by the Court below.

TABLE OF CONTENTS.

	Page
Questions Presented for Review	i
Table of Authorities	iii
Statement of Jurisdiction	1
Statement of the Case	2
Argument	11
Conclusion	20
Certificates	22
Appendix:	
Opinion and Order of the U.S. Claims Court entered March 16, 1983 granting in part Defendant's Motion for Summary Judgment	1a
Opinion and Order of the U.S. Claims Court entered May 27, 1983 denying Plaintiff's Motion for Rehearing	26a
Opinion and Order of the U.S. Court of Appeals for the Federal Circuit entered March 21, 1984	30a
Order of the U.S. Court of Appeals for the Federal Circuit entered April 10, 1984 denying Appellant's Petition for Rehearing	34a
Affidavit and Declaration of James F. Cochran, III and William G. Fischer dated August 21, 1982	35a

Page

TABLE OF AUTHORITIES.

Cases:

Admirality Fund v. Hugh Johnson Co., 677 F.2d 1301, 1305-1306 (9th Circuit, 1982) 14
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) 14,16
Conn v. United States, 376 F.2d 878, 880 (1967) 11
Garcia v. The United States, 108 F.Supp. 608 (1952) 11
Joseph Horne Co. v. The United States, 135 F.Supp. 549 (1965) 11
Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 17
Service v. Dulles, 354 U.S. 363 (1957) 18,19
Technograph Printed Circuits, Ltd. v. The United States, et al., 372 F.2d 969 (1967) 11
United States v. Diebold, 369 U.S. 654, 655 (1962) 14
United States v. Morgan, 313 U.S. 409, 421-422 (1941) 14

Statute:

10 U.S.C. §815 *et seq.* 5

Regulation:

AR 27-10 8,11,18,19

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PETITION FOR CERTIORARI

Statement of Jurisdiction

The judgment of the United States Court of Appeals for the Federal Circuit was decided on March 21, 1984. Petitioner's timely petition for rehearing was denied on April 10, 1984. The jurisdiction of this court is invoked under 28 U.S.C.A. §1331 and 28 U.S.C.A. §1346 (a)(2), §1491.

Statement of the Case

In May, 1981 the President of the United States was scheduled to address the graduating corps of West Point cadets among whom were members on orders to the 24th Infantry Division and Major General Cochran's son. The subject matter of his speech was to be focused upon the nation's defense policy and specifically possible future directions. On May 21, 1981, Major General Cochran was the commanding general of Fort Stewart, Hunter AAF and the 24th Infantry Division (mechanized), a vital unit of the Rapid Development Force (RDF). The RDF is an essential and integral factor in any consideration of our nation's defense policy and the implementation of the same.

In view of the fact that the gist of the President's address was to be upon the national defense policy, Major General Cochran and numerous other Army commanders planned to attend the graduation exercise as unit representatives of their respective commands.

Plaintiff's original intent was to fly on May 25, 1981 to Trenton, New Jersey to say farewell to the State Adjutant General and Commanding General of the 50th Armored Division—National Guard Training "Partnership" Unit of the 24th Infantry Division as well as to adjust any final details for the Annual Training 1981 to be held at Ft. Drum, New York and supported by men of the 24th Division.

Following graduation and enroute back to Ft. Stewart, Major General Cochran intended to visit Fort Bragg, North Carolina, to say farewell and exit brief General Tackaberry and General Rosenblum.

During May, 1981 Mrs. Faye C. Cochran, wife of plaintiff, now retired Major General James F. Cochran III, was suffering from symptoms of severe depression which had reached crisis proportions which for the Cochran family constituted a severe medical crisis and emergency.

Mrs. Cochran and Major General and Mrs. Cochran's daughter intended to drive to West Point from Hinesville, Georgia to attend the graduation ceremonies. A rental car was reserved for their use for the drive from Hinesville, Georgia to West Point, New York.

However, on or about May 23, 1981 Mrs. Cochran, under great stress and suffering from severe depression, informed Major General Cochran she could not make the drive to West Point, New York. Consequently, airline reservations were made for her round trip transportation to New York traveling alone. Mrs. Cochran's condition later aggravated itself to the degree she would not allow herself to be away from Major General Cochran. Major General Cochran, relying upon the previous consultation with his wife's physician, and his personal knowledge of his wife's present state, feared that she might attempt suicide. Major General Cochran understood that his wife was suffering from severe mental depression and was in fact on the verge of a mental breakdown.

At the time for Major General Cochran's trip to West Point, New York, Mrs. Cochran's mental condition worsened. Having consulted Mrs. Cochran's physicians and Army chaplain, and with a belief his wife was suffering a severe medical crisis of emergency proportions, Major General Cochran permitted Mrs. Cochran to accompany him on a military aircraft flight to West Point, New York on May 25, 1981.

Until the aircraft aborted due to mechanical failure, it was Major General Cochran's intent to stop at Ft. Bragg to call on the other general officers.

Major General Cochran failed to obtain the permission for his wife to accompany him on the aircraft in contravention of a non-punitive directive or policy which requested that he do so. On several occasions in the past during his command and with the knowledge of defendant, Major General Cochran had permitted his wife to accompany him on other flights when her presence had been requested by defendant but permission to fly aboard military aircraft had not been obtained prior to her departure. Such practice was known to and permitted by defendant as the requirement to seek permission was a non-punitive policy. On this particular occasion Major General Cochran felt under the circumstances there was insufficient time to brief the Chief of Staff of the Army as his last minute decision, in Major General Cochran's opinion, saved his wife from a mental breakdown and possible suicide attempt.

On June 11, 1981 Major General Cochran was interviewed by Colonel William F. Muhlenfeld and Major Harold J. Gerber, both of whom were from the office of the Inspector General, Department of the Army. Major General Cochran informed those gentlemen of the nature of his wife's mental and physical condition and advised them these facts could be verified by them communicating with his wife's chaplain and her physician. These two gentlemen, who represented they were fact finders, chose not to talk to the Chaplain or the physician or his aide notwithstanding Major General Cochran's suggestions.

On June 23, 1981, General Robert M. Shoemaker, Commander, United States Army Forces Command, initiated nonjudicial punishment proceedings under Article 15 of the Uniform Code of Military Justice (UMCJ) against Major General James F. Cochran.[1] Major General Cochran was notified that the two charges being considered were that he did:

(1) On or about 25 May, 1981, wrongfully appropriate a U-21 aircraft, property of the United States, by directing that it be flown to Newburgh, New York, and return for your own personal benefit, in violation of Article 121, UCMJ; and

(2) In or about March 1981, violate a lawful general regulation, to-wit: Paragraph 2-4, AR 600-50, dated 20 October 1977, by causing a diversion of Government facilities property, and manpower for the repair of a privately owned stove for your boat, in violation of Article 92(1), UCMJ.

On July 1, 1981, Major General Cochran elected to participate in the Article 15, UCMJ proceeding as to the charges noted above but at no time did he elect to be punished nor did he ever admit any guilt as to the charged offenses. A hearing was held shortly thereafter in the office of General Shoemaker at FORSCOM Headquarters, Ft. McPherson, Atlanta, Georgia. Major General Cochran was accompanied by his military defense counsel, Major William G. Fischer.

Major General Cochran pleaded not guilty to all charges and specifications. Major General Cochran stated he was justified in having his wife accompany him because of her mental and physical condition but that he

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[1] 10 U.S.C. §815 *et seq.* (1976).

was guilty of an error in judgment by failing to follow the nonpunitive policy of phoning for authorization of spousal travel from the Office of the Chief of Staff, United States Army. A policy, which he noted based upon his past experiences with defendant was set out in printed regulations, but frequently was modified in actual routine.

During the course of the hearing when requested by General Shoemaker whether Major General Cochran had any matters in defense, extenuation or mitigation to present, Major General Cochran requested copies of all written reports considered by General Shoemaker to include any and all reports written or otherwise which had been rendered by the Inspector General's office and which served as a basis for the charged offenses. Additionally, Major General Cochran requested that General Shoemaker speak with Dr. Alcide M. Lanoue, a Harvard and Yale educated physician who also commands the Ft. Stewart Army Hospital, and who was personally familiar with Mrs. Cochran's physical and mental condition. Further, Major General Cochran requested that General Shoemaker speak with the Army chaplain caring for Mrs. Cochran as well as his aide who was familiar with the circumstances surrounding the necessary last minute determination to allow Mrs. Cochran to accompany Major General Cochran on the flight to New York in an effort to avoid further deterioration of her mental state and physical health. All of these requests were refused or ignored.

Major General Cochran requested that the hearing not be open, but instead it should be private consideration, especially in view of the nature of the matters presented. General Shoemaker, subsequently and over Major General Cochran's express objections made prior thereto,

intentionally and willfully issued a written press release to the national wire services as to the Article 15, UCMJ proceeding.

General Shoemaker imposed punishment upon General Cochran as follows: "Forfeiture of $2,000; and to receive a written reprimand." On August 5, 1981, Major General Cochran, through civilian counsel and his military counsel, filed with General Shoemaker a request for reconsideration. General Shoemaker denied the request for reconsideration without yet consulting any of the requested witnesses.

On July 27, 1981 General Shoemaker denied Major General Cochran's request for the reports prepared by the Inspector General which were the basis of General Shoemaker taking action against Major General Cochran and the apparent basis of General Shoemaker's determination that Major General Cochran was guilty of five "founded" allegations of which General Shoemaker never gave Major General Cochran notice.

On August 13, 1981, General Shoemaker forwarded plaintiff's appeal to the Judge Advocate General, Major General Hugh J. Clausen, for appellate consideration, recommending that the appeal be denied. In his forwarding letter and for reasons totally unknown to Major General Cochran, General Shoemaker informed Major General Clausen that he received a comprehensive briefing concerning all relevant testimony on five "founded" allegations by the investigating officer, Colonel William F. Muhlenfeld. Major General Cochran had not been informed as to the nature of that briefing, the five "founded" allegations or the relevance of such a comment other than to show the prejudice and predisposition of General Shoemaker against Major General Cochran. Major General Hugh J. Clausen at the

time was inferior in rank to the person against whom the Article 15, UCMJ was being imposed as well as being inferior in rank to the person imposing the Article 15, UCMJ.

Major General Clausen took action on Major General Cochran's appeal. Without affording Major General Cochran an opportunity to defend against the new charge, Major General Clausen affirmed General Shoemaker in part and reversed him in part. He affirmed the violation under Article 121, UCMJ, concerning the personal use of a military aircraft. He found Major General Cochran not guilty of the diversion of government resources but found him guilty of dereliction of duty, through negligence, by wrongfully accepting a gift from a subordinate DAC and by wrongfully creating the appearance of using public office for private gain.

Major General Cochran advised Major General Clausen the information contained in the documents submitted to Major General Clausen could and would be confirmed by the same various witnesses requested of General Shoemaker to interview. Although within the appellate authority's reviewing authority, Major General Clausen elected not to interview any witnesses or to gather additional information.

Major General Cochran reserved the right to supplement his brief upon receipt of a copy of the Inspector General's investigation which served as a basis for the briefing and apparent five "founded" allegations against Major General Cochran of which he did not have knowledge or notice. On August 31, 1981 Major General Clausen took final action on the appeal of Major General Cochran. Contrary to Army Regulation 27-10 there was no showing an intermediate authority superior in rank to both Major General Cochran and General Shoemaker was not reasonably available to act on the appeal.

Although initially charged with the offenses of misappropriation of military aircraft for personal use and the diversion of government resources for work on an item of personal property, he was found guilty of the former, not guilty of the latter but guilty of dereliction of duty, through negligence, by wrongfully accepting a gift from a subordinate Department of Army Civilian (DAC) and by wrongfully creating the appearance of using public office for private gain. From those findings determined and approved by the delegated appellate authority, Major General Hugh J. Clausen, Petitioner appealed and filed an action in the United States Claims Court pursuant to 28 U.S.C.A. §1346 (a)(2), §1491, seeking that the Article 15, U.C.M.J. proceeding against Petitioner, to include its findings and sentence be dismissed and declared a nullity and that all pay and allowances which he has been illegally deprived be returned.

During the course of the trial proceedings, Petitioner moved on numerous occasions to depose General Shoemaker and Colonel Patrick A. Tocher, General Shoemaker's Staff Judge Advocate, but Respondent filed a motion for protective order and stay of discovery stating in essence that discovery should be suspended pending resolution for a summary judgment to be filed. That stay and protective order was never lifted, notwithstanding repeated requests for such relief and an opportunity to depose essential witnesses. The Respondent offered as evidence in support of its summary judgment the affidavit of a witness whom the moving party with support from the trial court refused to allow Petitioner to depose, and the trial court went so far as to use that same evidence contained in the witness's affidavit as authority for partially summarily denying Petitioner's cause of action.

The trial court mistakenly read Petitioner's trial brief filed in opposition to the moving party's summary judgment motion and wrongly concluded that Petitioner had not offered any contrary evidence when in fact Petitioner's brief contained direct contradictory evidence from both Petitioner and his assigned military counsel. Neverless, the trial court granted a partial summary judgment. The trial court determined that Petitioner was endeavoring to examine the mental process or methods by which the administrative decision was made and further determined that Petitioner's cause of action should be denied based upon the moving party's affidavits from a witness who was not subject to an examination and whom Petitioner had been denied the opportunity to depose.

The trial court granted Respondent's summary judgment in part and denied it in part. Nothing in the Army regulations authorized the reviewing authority to find Petitioner guilty of an additional uncharged offense and accordingly, the specific finding that Petitioner wrongfully accepted a gift from a subordinate was vacated.

The case was remanded to the Judge Advocate General for reconsideration of the appropriateness of the punishment for the offense affirmed which resulted in a redetermination and lowering of the forfeiture from $2,000.00 to $1,800.00 with the rest of the punishment remaining and the review being made part of the final judgment of the trial court. From the trial court's judgment granting in part Respondent's motion for summary judgment an appeal was filed in the United States Court of Appeals for the Federal Circuit. From the decision of that court on March 21, 1984, and its denial on April 10, 1984 of Petitioner's Petition for Rehearing, this case is timely presented.

Argument

Before a motion for summary judgment can be granted, there must be no genuine issue as to any material fact in litigation. *Technograph Printed Circuits, Ltd. v. The United States, et al.*, 372 F.2d 969 (1967) The United States Claims Court will not grant summary judgment where there is a genuine issue of material facts, and where such issue is present, for purposes of motion, all doubts will be resolved against the moving party. By Rules of Claims Court, Rule 56; *Garcia v. The United States*, 108 F.Supp. 608 (1952). In any motion for summary judgment, the movant has the burden to show that there is no such genuine issue of fact. *Joseph Horne Co. v. The United States*, 135 F.Supp. 549 (1965).

The power to impose non-judicial punishment charges a commanding officer, or an officer to whom that power has been delegated (AR 27-10, Para. 3-2b) with the grave responsibility of exercising his authority in a completely judicious manner (AR 27-10, Para 3-13a). Authority under Article 15 must be administered with absolute fairness in a formal and dignified manner at every stage of the proceedings (AR 27-10, Para 3-13a).

The United States Claims Court has specifically held that an Article 15, even though a prompt and efficient vehicle for dealing with minor disciplinary problems, nevertheless culminates in punishment and for that reason, it is to be administered in strict accordance with promulgated regulations. *Conn v. United States*, 376 F.2d 878, 880 (1967). General Shoemaker could not make an intelligent and judicious disposition of the charge against the Petitioner if he had prejudged the case and become predisposed both as to the findings of guilt as well as the sentence imposed. On his desk, prior to the

commencement of the hearing, General Shoemaker had written out the exact sentence to be imposed against Petitioner.

As it turned out, General Shoemaker read the litany of the ritualistic Article 15 UCMJ proceeding, refused Petitioner's request for information on the investigation or to have General Shoemaker talk to the various witnesses, then proceeded to impose the predetermined sentence by reading from the paper where it had been written, and then allowed Petitioner to make a statement if he desired. Such predetermination and predisposition against Petitioner was founded upon a belief held by General Shoemaker that Petitioner was guilty of five "founded" allegations contained in a comprehensive briefing given by the investigating officer. General Shoemaker never informed Petitioner of the nature of those five "founded" allegations. General Shoemaker's later mention of those allegations in his August 13, 1981, letter to Major General Hugh J. Clausen, an officer inferior in rank to both General Shoemaker and Major General Cochran can only be interpreted as evidence of his predisposed prejudice against Petitioner as well as an effort to prejudice and influence the mind of Major General Clausen. In his initial petition for relief as well as within the contents of this affidavit, Petitioner and his assigned military counsel charged General Shoemaker with being predisposed as to the guilt of Petitioner and in having predetermined the exact sentence to be imposed.

However, the trial court in responding to Petitioner's contention that General Shoemaker had decided what punishment he would impose without awaiting Petitioner's hearing, because he had read the exact punishment which was the only punishment written on a

yellow sheet of paper previously written out determined from an affidavit filed by Colonel Patrick A. Tocher, General Shoemaker's staff judge advocate, that the yellow sheet of paper had been furnished with a *range* (emphasis added in the trial court's opinion) of permissible punishment and a blank space for one to be chosen, and that General Shoemaker at the time he announced the punishment merely filled in the blank space with his choice. The trial court specifically noted that Petitioner had not offered any contrary evidence and apparently did so without having read the initial affidavits filed by Petitioner and his assigned military counsel.

Prior to the court rendering its opinion on March 16, 1983, the Respondent had repeatedly denied and successfully obtained an order from the court denying Petitioner's numerous and repeated efforts to depose the persons of General Shoemaker and Colonel Tocher. The Respondent used the affidavit of Colonel Tocher in support of its motion for summary judgment and its contention that General Shoemaker had completely judiciously handled the Article 15 proceeding and yet they continuously denied Petitioner the opportunity to test the truthfulness, creditability, and sufficiency of information held by that very witness, Colonel Patrick A. Tocher.

Considering those circumstances, the trial court was obligated to deny Respondent's motion since a question of fact clearly existed as to whether or not, in fact, General Shoemaker had predisposed himself, predetermined the guilt of the accused, and without consideration of any matter, predetermined the exact sentence to be imposed against the Petitioner thus not handling the Article 15 proceeding in a completely

judicious manner. It is well settled law as cited that where material facts are in issue, as they were in this case, summary judgment may not be granted. The summary judgment is only appropriate where there is no contest as to the facts and the moving party is entitled to prevail as a matter of law. Material issues are those which might affect the outcome of the litigation and require a trial to resolve the parties differing versions of the truth. *Admirality Fund v. Hugh Johnson Co.*, 677 F.2d 1301, 1305-1306 (9th Circuit, 1982). The very fact General Shoemaker was in all likelihood predisposed against Petitioner in both a determination of guilt as well as a determination of the punishment to be imposed is such a material issue of fact, the resolution of which could only be resolved by a trial or at a minimum by permitting the Petitioner to test through deposition the very credibility, truthfulness and sufficiency of knowledge of those persons employed by the Respondent in support of its motion.

The trial court was required to view any disputed facts or inferences in the light most favorable to the party opposing the motion. *United States v. Diebold*, 369 U.S. 654, 655 (1962).

Upon learning of its apparent err, the trial court in response to Petitioner's motion for rehearing determined that absent a strong preliminary showing of bad faith, it is improper to permit inquiry into the mental processes or methods by which an administrative decision maker reached his conclusions and cited in support thereof *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *United States v. Morgan*, 313 U.S. 409, 421-422 (1941), concluding that Petitioner had failed to make such a showing in this case. However, Petitioner contends that *Overton Park* stands for the proposition

that where there are no formal findings made at the same time as an administrative decision is made, the court considering the administrative decision on plenary review, may examine the decision makers themselves if that is the only way there can be an effective judicial review of the administrative decision. In this case, there are no findings and no record of the proceedings other than the initial Article 15 document. The very conduct of the proceedings is in dispute and the fact of whether the yellow legal pad page document employed by General Shoemaker in conducting the proceeding contained a range of punishments without having the actual punishment included, or alternatively was a sheet of paper which contained only the exact punishment which was imposed is unclear and in dispute. Apparently, the trial court chose to believe the affidavit of the Respondent's witness without giving the Petitioner an opportunity to examine that witness and without consideration of Petitioner's evidence to the contrary produced in affidavit form.

Petitioner presented to the trial court below substantial evidence in the form of affidavits which contained material facts known personally to the affiants upon which the trial court could have and indeed was required by law to presume true insofar as determining the merits of Respondent's motion for summary judgment.

The test of whether to grant or deny a motion for summary judgment is not whether the facts presented would necessarily allow the party defending a summary judgment motion to prevail at trial, but rather the standard is if there are genuine issues of material fact existing between the parties when viewed in the light most favorable to the party defending a motion for

summary judgment, then the motion should be denied. Contrarily, the Appeals Court felt such accusations would flood the courts alleging judicial impropriety. However, there are two distinctions. First, this action was administrative not judicial and was acted on not by a lawyer or judge but by a layman. Secondly, Petitioner was prevented from even asking questions of the administrative official. Petitioner contends that such nonjudicial administrative decisions are not so sacrosanct that even the discovery process should be disallowed.

The trial court should never have considered the affidavit of Colonel Tocher because the trial court denied Petitioner the opportunity to examine and orally depose Colonel Tocher, and accordingly, test the credibility and sufficiency of knowledge of the very witness the government used in support of its motion. Colonel Tocher has not been subjected to cross-examination nor the type of questioning which is envisioned by the advocacy process. If Colonel Tocher's affidavit is not considered, then the Respondent below did not produce any evidence to contradict Petitioner's contention that General Shoemaker was predisposed as to the guilt of the Petitioner and had specifically predetermined the punishment to be imposed against the Petitioner without consideration of any of the evidence presented and accordingly did not conduct the proceedings in a completely judicious manner with absolute fairness.

Even assuming *arguendo* that *Overton Park* requires a bad faith showing by Petitioner, without discovery being permitted, what more can Petitioner present other than that which he did in affidavit form when he and his attorney attested to the fact General Shoemaker never conducted the investigation personally, never

interviewed any witnesses, wrote only the specific punishment down on a piece of paper before the proceeding began and read exactly from that piece of paper thus announcing a finding and sentence before Plaintiff ever had an opportunity to present any matters in defense, mitigation or extenuation. Yet, even with that information before it the trial court would not lift its order staying discovery and would not permit Petitioner to despose either General Shoemaker or Colonel Tocher. Perhaps, Petitioner would not have prevailed on the merits of his predisposition motion, but Petitioner should have the opportunity to investigate and discover more evidence after showing as he did, that the administrative official prejudged and predetermined the merits and punishment of the case.

In *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967, the Supreme Court of the United States reversed a summary judgment for the defendant in a suit to recover royalties. The Court analogized a summary judgment to a motion for directed verdict, noting that the defendants' affidavits had been given by interested or biased witnesses, the weight of whose testimony, if given at trial, would have been for the jury to decide. The Court further noted that "It may well be that the weight of the evidence would be found on a trial to be with the defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given their opinions is to be determined, after trial, in the regular manner."

The trial court erred in granting summary judgment because genuine issues of material fact exist as to whether General Shoemaker was predisposed as to the

guilt of the Petitioner and had specifically predetermined the sentence to be imposed without consideration of any evidence presented so that he could not impartially and judiciously administer the Article 15 proceeding with absolute fairness at every stage of the proceeding according to established procedural due process and applicable regulation by which the Army is bound. *Service v. Dulles*, 354 U.S. 363 (1957).

Contrary to Army Regulation (AR) 27-10 Para. 3-2b(2) the Article 15 of Petitioner was referred by General Shoemaker to MG Hugh J. Clausen, the Judge Advocate General for review. The authority given to a commanding officer under Article 15, UCMJ is an attribute of command, and *except* as provided in the regulation may not be delegated. AR 27-10, Para. 3-2b. The Secretary of the Army under the authority contained in the provisions of Article 15, UCMJ has determined that delegated authority may be exercised only when the officer to whom such authority has been delegated is when acting on an appeal or taking other action with respect to punishment imposed under Article 15, senior in rank both to the person punished and the officer who imposed the punishment. AR 27-10, Para. 3-2b. General Shoemaker on August 13, 1981, forwarded Petitioner's appeal to the Judge Advocate General, MG Hugh J. Clausen for appellate consideration. Major General Clausen was at the time junior in rank to both General Shoemaker and Major General Cochran.

The Secretary of the Army has designated the Judge Advocate General the authority next superior for the purpose of acting on appeal for punishments imposed under Article 15, UCMJ *when there is no intermediate superior authority reasonably available to take this action.* AR 27-10, Para. 3-22. There is no legal authority for the proposition that the individual paragraphs of the

regulation are to be considered separate and apart. There was no proof provided at the Article 15 appellate level or at the trial that an intermediate superior authority was not reasonably available to take action on this case. General Shoemaker should have referred the Article 15, UCMJ action for review to a full four-star general who was a reasonably available intermediate superior authority and who was superior in rank to both General Shoemaker and Major General Cochran.[2]

Given the peculiar nature and composition of the military which has on numerous occasion been noted by the court, it is unreasonable to presume that in reviewing an administrative action the two-star reviewing authority who is subordinate to the four-star imposing authority will not be influenced by the ranks and positions of the respective parties. In this case, a review of the initial action taken by the two-star reviewing authority shows to what lengths the reviewers went in an effort to preserve the entirety of the initial Article 15 proceeding. The regulation as established envisioned a situation peculiar to the military whereby it is not in the best interests of the individual service members for Article 15 appeals to be acted on by one who is inferior in rank to both the person receiving the Article 15 and the person imposing it. Accordingly, the Article 15 proceeding as stated should have been referred for review to the next reasonably available intermediate superior authority, and there has been no showing that an intermediate superior authority was not reasonably available to take action on this matter. The Army is required to follow its own established regulations. *Service v. Dulles*, 354 U.S. 363 (1957).

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[2] The Court should be aware the new AR 27-10 not in effect at the time but effective 1 September 1982, specifically amended and clarified Para. 3-7(b)(2) by stating "the authority delegated under (1) above may be exercised only when the delegate is senior in rank to the person punished, a delegate need not, when acting as a superior authority on an appeal be senior in rank to the imposing commander."

Conclusion

The trial court erred in granting a partial summary judgment. The trial court accepted the affidavit of a witness and incorporated the contents thereof into its opinion determining the statement to have been uncontradicted, but the trial court apparently neglected to review the affidavits of Petitioner and his assigned military counsel which directly refuted the witness. The Petitioner had repeatedly tried to examine and depose that witness to ascertain whether General Shoemaker had indeed prejudged the merits of the case and predetermined the sentence to be imposed as well as to test the truthfulness and credibility of the affiant, but at every instance and request Petitioner was denied the opportunity.

The only evidence in opposition to Petitioner's sworn affidavit attesting to prejudgment and predetermination contrary to law and regulation is the affidavit of a witness who Petitioner was denied access. Accordingly, that testimony should not have been accepted or considered by the trial court. Correspondingly, this nonjudicial administrative proceeding is not sacrosanct and Petitioner upon showing a *prima facie* case of administrative prejudgment and predetermination contrary to law and regulation should be permitted the opportunity of discovery especially when the court relies upon Respondent's affidavits when rendering its opinion yet denies Petitioner the opportunity to question the affiants.

Assuming *arguendo* a showing of bad faith is required before the deposition of an administrative official would be permitted such a showing was made by Petitioner's affidavits which showed that General Shoemaker did not conduct the investigation, did not interview any

witnesses, wrote out only the punishment to be imposed on a yellow legal pad page before the proceeding and announced his findings and sentence *before* giving Petitioner an opportunity to present matters in defense, extenuation and mitigation. At a minimum, Petitioner should have been permitted to depose General Shoemaker and Colonel Tocher.

Contrary to Army regulation the Article 15 was initially reviewed and acted upon by an individual who was junior in rank to the person receiving the Article 15 as well as the person imposing the Article 15 without a determination ever having been made as to the existence and reasonable availableness of an intermediate superior authority.

Respectfully submitted,

JONES, OSTEEN, JONES & ARNOLD
CHARLES M. JONES
JEFFERY L. ARNOLD
Counselors for Petitioner, Major General (Ret.) James F. Cochran, III

Certifications

I, Charles M. Jones, hereby certify that I am qualified to practice before the United States Supreme Court, and that My application has been filed and is currently pending.

CHARLES M. JONES

DATED: July 6, 1984

I, Jeffery L. Arnold, hereby certify that I am a member in good standing in the bar of the United States Supreme Court having been admitted on November 9, 1981.

JEFFERY L. ARNOLD

DATED: July 6, 1984

APPENDIX

Opinion and Order of the U.S. Claims Court entered March 16, 1983.

IN THE

UNITED STATES CLAIMS COURT

No. 690-81C

(Filed March 16, 1983)

MAJOR GENERAL (RET.) JAMES F. COCHRAN, III,

v.

THE UNITED STATES

Military pay; Article 15 non-judicial punishment; scope of judicial review; nature of preliminary inquiry into charges; burden of proof; right of military reviewing authority to modify findings limited by scope of original charge.

Charles M. Jones, Hinesville, Georgia, attorney of record, for plaintiff. *Jeffrey L. Arnold* and *Jones, Osteen & Jones*, of counsel.

Michael D. Morin, Washington, D.C., with whom was *Assistant Attorney General J. Paul McGrath*, attorney of record for defendant. *Major Chris G. Wittmayer*, of counsel.

Appendix—Opinion and Order of the U.S. Claims Court entered March 16, 1983.

OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MILLER, *Judge*:

In May 1981, the plaintiff, then Army Major General James F. Cochran, III (MG Cochran), requisitioned a military aircraft for a round trip flight for himself and his wife from Fort Stewart, Georgia (at which he was then commandant), to an airport near the United States Military Academy at West Point, New York, where they attended graduation ceremonies for their son.

In March 1981, MG Cochran gave his personal property, a boat stove to a Mr. Watford, a civilian government employee, under his command at Fort Stewart, for conversion from alcohol to propane use and for repair. Watford purchased $50 in repair parts out of his own funds, but was unsuccessful in his efforts to repair the stove. He then took the stove to the refrigerating, heating and plumbing shop at Fort Stewart, where the foreman and assistant foreman respectively performed the appropriate major repairs and adjustments to it using government purchased supplies.

After receiving information as to these transactions, on May 28, 1981, the Army Vice Chief of Staff directed the Inspector General to inquire into allegations that MG Cochran had committed improprieties. Thereafter, on June 20, 1981, a colonel from the office of the Inspector General briefed General Robert M. Shoemaker, Commander, United States Army Forces Command, Fort McPherson, Georgia, on the results of the Inspector General's investigation.

Appendix—Opinion and Order of the U.S. Claims Court entered March 16, 1983.

On June 23, 1981, General Shoemaker initiated proceedings against MG Cochran by sending him a notice stating the following:

> 1. I am considering whether you should be punished under Article 15, UCMJ[1], for the following misconduct:
>
> a. You did, at Fort Stewart, Georgia, on or about 25 May 1981, wrongfully appropriate a U-21 aircraft, property of the United States, by directing that it be flown to Newburgh, New York, and return for your own personal benefit, in violation of Article 121, UCMJ.
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> b. You did, at Fort Stewart, Georgia, in or about March 1981, violate a lawful general regulation, to wit: para 2-4, AR 600-50, dated 20 October 1977, by causing a diversion of Government facilities, property, and manpower for the repair of a privately owned stove for your boat, in violation of Article 92(1), UCMJ.
>
> 2. You have several rights under this Article 15 procedure. First, I want you to understand that I have not yet made a decision whether or not you will be punished, and I will not impose any punishment unless I am convinced beyond a reasonable doubt that you committed the offense. You may ordinarily have a public hearing before me. You may bring a person to speak on your behalf. You may present witnesses and other evidence to show why you shouldn't be punished at all *(matters in defense)* or why punishment should be very light *(matters in extenuation and mitigation)*. I shall consider everything you present before deciding whether I will impose punishment or the type and amount of punishment I will impose. You are not

[1] Uniform Code of Military Justice.

> required to make any statements at all, but if you do, they may be used against you in this Article 15. If you do not want me to dispose of this report of misconduct under Article 15, you have the right to demand trial by court-martial instead.
>
> In deciding what you want to do you have the right to consult with a lawyer located at US Army Trial Defense Service, Bldg 375, Fort Stewart, Georgia. You now have 72 hours to decide what you want to do. [Emphasis in original; footnotes omitted.]

MG Cochran responded to the notice on July 1, 1981, signifying thereon that:

> Trial by Court-Martial is *not* demanded and in the Article 15 proceedings:
>
> a. An open hearing * * * is not requested.
>
> b. A person to speak on my behalf * * * will not accompany me.
>
> c. Matters in defense and/or extenuation * * * will be presented in person.

On July 2, 1981, General Shoemaker held a hearing pursuant to Article 15, to consider the matters raised by MG Cochran in defense and in extenuation and mitigation of the charges against him. In addition to plaintiff and General Shoemaker, plaintiff's military defense counsel and General Shoemaker's staff judge advocate were present at such hearing. Due to the informal nature of the proceedings no transcript was required to be made (AR 27-10, para. 3-15a[2]), and none was made.

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[2] References hereinafter to AR are to the Army Regulations dated August 15, 1980.

Appendix—Opinion and Order of the U.S. Claims Court entered March 16, 1983.

General Shoemaker's decision, entered July 6, 1981, was as follows:

> I have considered all matters presented in defense and/or extenuation and mitigation. The following punishments are imposed:
>
> Forfeiture of $2,000; and to receive a written reprimand (attached).

The reprimand stated:

> 1. You are hereby reprimanded.
>
> 2. Your actions in diverting Government material, facilities and manpower for your personal use and benefit constitute a gross abuse of the important position of command entrusted to you. A senior officer of your grade and position should be looked to by his subordinates as an example of integrity and dedication in the honorable profession in which we serve. By your disregard of law and regulations you have disgraced the officer corps of the Army, and have demonstrated a lack of leadership.
>
> 3. This reprimand is imposed as punishment under Article 15, Uniform Code of Military Justice.

On August 5, 1981, MG Cochran appealed such punishment to the next superior authority.

On August 13, 1981, General Shoemaker forwarded the appeal with an accompanying memorandum to Major General Hugh J. Clausen (MG Clausen), the Judge Advocate General of the Department of the Army, to whom the appeal had been assigned. In his memorandum General Shoemaker summarized the record in the Article 15 proceedings and stated his conclusion as follows:

3. Although the DA[3] Inspector General investigation was not available, I had received a comprehensive briefing concerning all relevant testimony on five "founded" allegations by the investigating officer, COL William F. Muhlenfeld. I had available and reviewed the four written witness statements pertaining to the two charged offenses (Incl 3). These statements were provided to the appellant and his military defense counsel prior to the hearing.

4. As to the misuse of aircraft, MG Cochran testified before me that his actions were admittedly wrong, but there were extenuating and mitigating circumstances, which he presented to me in detail. I am convinced, however, that his primary purpose in traveling to the United States Military Academy was personal, not official. In this connection, attention is invited to MG Cochran's testimony before the IG at pages 17 and 20. This unedited transcript (Incl 4), although not available at the time I imposed punishment, has now been considered because of MG Cochran's allegations against the IG, and because of his statements now regarding his trip to West Point.

5. Concerning the offense of causing government repair of the boat stove, MG Cochran's actions speak for themselves. In my opinion, he knew the extent of work required, knew Mr. Watford's methods, and was well aware that his position as Commanding General of the Division and Fort Stewart would cause the stove to be converted on Government time and at Government expense. My view now is the same as I stated to him at the conclusion of the hearing, that is, he not only created the appearance of wrongdoing, but he

[3] DA refers to the Department of the Army.

actually knew he was doing wrong. There is no evidence of an offer to reimburse Mr. Watford for his time or his stated expenditures. I am informed that Mr. Watford did not testify at the IG inquiry because of his status in an ongoing FBI investigation into other matters. I am satisfied, however, that sufficient information was presented to me for an informed and fair decision.

6. The punishment should stand. MG Cochran, under all facts and circumstances, misused his position for personal gain.

MG Clausen's decision on the appeal, issued August 31, 1981, stated:

2. After carefully reviewing the evidence, which includes written matters supplied by MG Cochran's attorney that were not available when you imposed punishment, your findings were affirmed except that I reduced the finding of guilty of Article 92 to a lesser offense of negligent dereliction of duty. This action is reflected on the attached DA Form 2627, a copy of which should be provided to MG Cochran.

3. I have determined the punishment to be just and appropriate for the affirmed offenses. Accordingly, the punishment imposed on MG Cochran has not been reduced.

And on the attached DA Form 2627 he stated:

The findings of guilty of the Article 121, UCMJ, offense (wrongful appropriation) and only so much of the Article 92, UCMJ, offense as finds petitioner guilty of the lesser offense of dereliction of duty, through negligence, in violation of Article 92, UCMJ, by wrongfully accepting a gift from a subordinate DAC and by wrongfully creating the appearance of using public office for private gain, in

> contravention of paragraphs 1-3e and 2-3, Army Regulation 600-50, said conduct violating a duty created by the cited Regulation, is affirmed. The punishment is approved.

In this suit plaintiff seeks to have the Article 15 proceedings and findings and sentence declared a nullity and the $2,000 forfeiture in military pay returned to him. Defendant moves for summary judgment.

Before taking up the various grounds for relief asserted by plaintiff it is necessary to consider the nature of the Article 15 proceedings.

The Uniform Code of Military Justice prescribes four methods for dealing with offenses charged against members of the Armed Forces: three kinds of courts-martial, general, special and summary, jurisdiction of which varies with the seriousness of the allowable penalty (Arts. 16-20 of the Code (10 U.S.C. §§816-20)); and "Commanding Officer's Non-judicial Punishment" (Art. 15 (10 U.S.C. §815)).

General and special courts-martial are full judicial proceedings with panels of three to six judges, one of whom must be a lawyer, counsel for both sides and various basic protective and procedural rights similar to those incident to judicial trials. (Arts. 26 *et seq.* (10 U.S.C. §826 *et seq.*).) A summary court-martial consisting of one commissioned officer has jurisdiction over offenses having specified relatively lesser penalties and also requires a judicial trial, but may not be ordered over the objection of the accused. (Arts. 16, 20 (10 U.S.C. §§816, 820).)

Appendix—Opinion and Order of the U.S. Claims Court entered March 16, 1983.

As reflected in its title Article 15 punishment is nonjudicial. Under such regulations as the President and Secretary of the Department may prescribe, unless the accused member of the Armed Forces demands trial by court-martial, Article 15 empowers a commanding officer to "impose one or more" specified "disciplinary punishments for minor offenses without the intervention of a court-martial." The Army regulations stated that "The Article 15 proceedings before the commander is not an adversary proceeding." (AR 27-10, para. 3-14b.) In *Middendorf v. Henry*, 425 U.S. 25, 31-32 (1976), the Supreme Court described "Article 15 punishment, conducted personally by the accused's commanding officer, [as] an administrative method of dealing with the most minor offenses."

In *Dumas v. United States*, 223 Ct. Cl. 465, 472-74, 620 F.2d 247, 251-52 (1980), the Court of Claims had occasion to review in considerable detail the nature and incidents of Article 15 punishment proceedings. Although to some degree the court relied on Air Force regulations, the Army regulations are similar, and the court's description of the proceedings are equally pertinent here:

> Article 15 nonjudicial punishment * * * is the least formalized method of discipline, conducted personally by the accused's commanding officer. The legislative history accompanying 10 U.S.C. §815 states "Article 15 * * * provides a means whereby military commanders may impose nonjudicial punishment for minor infractions of discipline." * * * The legislative history states definitely that Article 15 nonjudicial punishment is noncriminal in character and "in this sense has no connection with the military court-martial system." [Citation omitted.]

Under Article 15 the accused is given specific notice of the offense charged and asked to elect for either nonjudicial punishment by his commanding officer or demand trial by court-martial. Election of nonjudicial punishment constitutes a waiver of the right to demand trial. *Manual for Courts-Martial* * * * ¶133 (rev. ed. 1969). But failure to demand trial by court-martial, however, "is not a plea of guilty to the described offense(s). Accordingly, commanders must carefully consider all matters submitted in defense." Air Force Regulation (AFR) 111-9(6)(h) (July 24, 1974).

If nonjudicial punishment is elected the accused is given a reasonable time for preparation and then appears before his commanding officer to offer matters in defense or mitigation of the offense charged. The accused may call witnesses who are reasonably available locally and who can be presented without legal process. AFR 111-9(6)(e). There is no requirement at the accused's appearance for the commander to *present* evidence to establish the commission of the offense or offenses. *Id.* No formal evidentiary standards apply to Article 15 proceedings, however, under Air Force regulations, "punishment should be imposed only when the commander is convinced by reliable evidence that the offender committed the offense." AFR 111-9(4)(a). [Emphasis in original.]

If, after the accused's presentation, the commander is convinced the offender committed the offense, nonjudicial punishment may be imposed. The punishments a commanding officer can award are strictly limited and significantly milder than those authorized under courts-martial. * * * The accused has specific rights of appeal of which he must be notified.

See also Cappella v. United States, 224 Ct. Cl. 162, 624 F.2d 976 (1980).

Plaintiff argues first that he is entitled to a *de novo* hearing in this court on his guilt or innocence of the charges against him. The obvious response to this contention is that both the statute and the regulations gave plaintiff an opportunity for a trial by court-martial with all of the protective incidents to such a trial, and plaintiff waived it. Article 15 provides that nonjudicial punishment may not be imposed by the commanding officer if the accused demands a trial. Section 133a of the *Manual for Courts-Martial* (1969 Rev. ed.) (MCM), provides that "An election to accept nonjudicial punishment constitutes a waiver of the right to demand trial." And in his consent to the nonjudicial punishment plaintiff expressly waived trial by court-martial. It would hardly be reasonable to impute to Congress in the enactment of the Uniform Code of Military Justice the intent to allow an accused to waive trial by a court in favor of minor punishment by his commanding officer and then after the punishment is imposed to repudiate his election and obtain a *de novo* trial by another court.

Furthermore, Article 15 deals with a range and variety of punishments to be imposed *by the commanding officer.* The legislative committee report on Article 15 (10 U.S.C. §815) also emphasizes that Article 15 punishment is "nonjudicial punishment for minor infractions of discipline," to be imposed by "military commanders * * * as an essential part of their responsibilities to preserve discipline and maintain an effective armed force." (S. Rep. No. 1911, 87th Cong. 2d Sess. 2-4, *reprinted in* 1962 U.S. Code Cong. & Admin. News 2379, 2380-81.) There is nothing in the training or expertise of the members of this court which qualifies them to substitute their

judgment for that of the commanding officer of plaintiff's military unit in choosing which of the range of permissible punishments is most suitable for maintaining the discipline, morale and effectiveness of the organization; and a *de novo* judicial trial by this court would fly in the face of the pertinent legislative intent.

Plaintiff cites *Hagarty v. United States*, 196 Ct. Cl. 66, 449 F.2d 352 (1971) as a precedent for a *de novo* trial of an accused punished under Article 15. But in that case the accused naval enlisted man was not given the option of a judicial trial before punishment was imposed by the captain of his vessel.[4] Moreover, the court proceedings were not on the merits of the charges against the accused but on whether the conduct of the Article 15 proceedings was compatible with the statute and regulations. The court in that case described the captain's mast proceeding in which he imposed punishment on the accused as an "outrageous spectacle" in which the captain engaged in "angry, profane and abusive conduct toward the accused," the accused was never given "full opportunity * * * to present any matters in mitigation, extenuation, or defense of the suspected offenses" as required by section 133(b) of the Uniform Code of Military Justice, and there were other important disregards of the requirements of Article 15 and the applicable regulations. *Hagarty, supra*, 196 Ct. Cl. at 81, 84, 449 F.2d at 360, 361. *See also Cappella v. United States, supra*, 224 Ct. Cl. at 168, 624 F.2d at 979.

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[4] Article 15 provides that "except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment." [Underscoring supplied.] (10 U.S.C. §815(a).) *See also* MCM section 132.

Appendix—Opinion and Order of the U.S. Claims Court entered March 16, 1983.

In a suit seeking to overturn nonjudicial punishment imposed under Article 15, this court's jurisdiction is limited to cases involving money claims founded upon allegations of lack of compliance with the requirements of the statute, the controlling regulations and the Constitution. *Hagarty v. United States, supra,* 196 Ct. Cl. at 85, 449 F.2d at 362; *Dumas v. United States, supra,* 223 Ct. Cl. at 471, 620 F.2d at 250. We turn now to plaintiff's contentions that there was such lack of compliance.

Plaintiff contends that the offenses with which he was charged were not minor offenses, and hence Article 15 administrative punishment does not bar him from demanding a judicial trial in which the burden of proof would be on the government. However, nothing in the language of Article 15 states that it is inapplicable merely because the offense could have warranted more severe punishment and a recommendation for court-martial. In *Cappella v. United States, supra,* 224 Ct. Cl. at 166, 624 F.2d at 978, the Court of Claims ruled that "the commanding officer has broad discretion to determine whether a particular alleged offense is sufficiently serious to warrant court-martial rather than nonjudicial punishment under Article 15." Plaintiff has not shown that the commanding officer abused his discretion in offering plaintiff the lesser Article 15 punishment. If plaintiff believed that the nature of the Article 15 proceedings placed him in an unfavorable posture, he had a ready remedy to avoid it. He could have asked for a court-martial and thus forced General Shoemaker either to assume the burden of proof or to drop the charges.

Plaintiff alleges that General Shoemaker failed to make the preliminary inquiry mandated by MCM section 32(b) because he "adopted as his own the briefing given him by members outside his command from the Inspector General's investigation from Washington."

MCM section 32 provides:

> 32. ACTION BY COMMANDER EXERCISING IMMEDIATE JURISDICTION UNDER ARTICLE 15.
>
> * * * * *
>
> b. Preliminary inquiry. He will make, or cause to be made, a preliminary inquiry into the charges or the suspected offenses sufficient to enable him to make an intelligent disposition of them. This inquiry is usually informal. It may be conducted by the commander or by a member of his command. It may consist only of an examination of the charges and the summary of expected evidence which accompanies them. In other cases it may involve a more extensive investigation and the collection of evidence. * * * It is not the function of the person making the inquiry merely to prepare a case against the accused. He should collect and examine all evidence that is essential to a determination of the guilt or innocence of the accused, as well as evidence in mitigation or extenuation.

This section is somewhat modified by MCM section 133, which provides:

> 133. PROCEDURE; RECORDS OF PUNISHMENT.
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> a. Procedure for Army and Air Force. The commanding officer, upon ascertaining to his satisfaction after any inquiry he considers necessary

> that an offense punishable under Article 15 has been committed by a member of his command, will, if he determines to exercise his Article 15 authority, so notify the member of the nature of the alleged misconduct by a concise statement of the offense in such terms that a specific violation of the code is clearly stated and inform him that he intends to impose punishment under Article 15 for the misconduct * * *. [Underscoring supplied.]

The language is clear that the preliminary inquiry need not be made personally by the commander. It is sufficient if he "cause[s] it to be made." The inquiry need only be "sufficient to enable him to make an intelligent disposition" of the charges. It may be "informal." The commanding officer's inquiry "may consist only of an examination of the charges and the summary of expected evidence which accompanies them." More important, the sections do not contemplate an objective standard for the sufficiency of the preliminary inquiry but only that the commanding officer ascertain "to his satisfaction after any inquiry he considers necessary" that the offense has been committed. It is apparent that the regulations do not place any particular importance on who conducts the preliminary investigation as long as the accused's commanding officer examines the charges and summary of the evidence and exercises his own judgment on whether or not there is a basis for initiating the proceeding.

Accordingly, there was no violation of the regulations in General Shoemaker's reliance for his preliminary investigation upon the oral report made to him by Colonel William F. Muhlenfeld of the Office of the Inspector General as to the results of his investigation,

accompanied by the statements of four witnesses procured by the latter.

Plaintiff would apparently convert the informal inquiry into the equivalent of a grand jury investigation prior to a criminal indictment. This clearly is incompatible with the nature of the nonjudicial proceeding contemplated by the statute.

Next plaintiff asserts that in the course of the Inspector General's investigation he gave the investigators information that Mrs. Cochran suffered physical and mental ill health, and that Dr. Alcide Lanoue (plaintiff's military physician), Captain Shelby T. Clark (plaintiff's military aid) and Chaplain Wade could verify this, and thereby substantiate plaintiff's statement that he only took her along on the air flight to West Point because she was unable to tolerate the long automobile trip from Fort Stewart, which he had originally planned for her; but the investigators never interviewed such potential witnesses who might have substantiated his defense or offered evidence in mitigation or extenuation of his offense. Plaintiff contends that this failure to interview such witnesses was in violation of the requirements of MCM section 32(b) that the person making the preliminary inquiry not limit himself to preparing a case against the accused but "should collect and examine all evidence that is essential to a determination of the guilt or innocence of the accused, as well as evidence in mitigation or extenuation."

In the light of the legislative intent that Article 15 be a device for the simplified nonjudicial administration of punishment by a commanding officer for a minor offense

by a subordinate, there is no basis for imputing to Congress the intent that an accused, after he has been found guilty of the charge and his punishment has been affirmed by higher military authority, have the right to independent judicial reexamination of the merits of the finding. It is even more difficult logically to impute to Congress the intent that under such circumstances the accused have the right to review by a civilian court of the adequacy and scope of the preliminary inquiry. In any event, examination of the record produced by plaintiff indicates that he has failed to demonstrate that the investigation was inadequate for its purpose.

To show that plaintiff told the investigators about his wife's mental condition as a reason for taking her along without authorization on the government aircraft, plaintiff has included in his opposition to defendant's motion a copy of portions of the transcript of his interview with the Inspector General's investigators. However, it does not show that at that time plaintiff furnished the names of corroborative witnesses. In any event, there was no need to obtain corroboration, for, assuming the truth of plaintiff's allegations, they would not establish an adequate defense warranting not proceeding with the Article 15 notification because—

(a) In the same interview plaintiff conceded that the purpose of the trip from Fort Stewart to West Point in government aircraft by both husband and wife was for both of them to attend their son's graduation and that he had no other purpose for his own trip;

(b) There was no allegation that the wife's trip was a medical emergency; and

(c) No explanation was offered why both the plaintiff and his wife could not have travelled together to West Point by commercial airline at their own expense.[6]

Next plaintiff assigns as error that his commanding officer failed to call three witnesses who could have testified as to Mrs. Cochran's mental and physical

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[6] Plaintiff contended that the transcript of his interview could not be availed by the government because the investigators advised him before he testified that his testimony could not be used against him. Actually, the precise statements by the interviewer were:

> Our mission is to advise the Vice Chief of Staff as to our findings so that he can make a determination about what further action, if any, to take. * * * The testimony that you give us this morning is not admissible in any subsequent proceeding if there should be one. Other evidence that we get in the course of our investigation is admissible. * * * But testimony is not admissible.

and

> [t]he material that we collect here is not admissible in any subsequent proceeding if there is one. * * *
>
> A. In other words, any subsequent proceeding would be de novo?
>
> Q. That's right.

The interviewer's statements are not necessarily inconsistent with use of the plaintiff's admissions as part of the preliminary investigation. He did state that the interview was to enable a determination as to what further action to take. What other purpose could plaintiff have understood as the reason for conducting the interview at all? But be that as it may, plaintiff's contention here that in the course of the interview he gave to the interviewers investigative leads which they failed to follow up without justification constitutes a waiver of plaintiff's privilege that his testimony not be used against him. It would be unfair to allow plaintiff to use in support of his argument as to the impropriety of the preliminary inquiry only a part of the available record of that inquiry if it resulted in a distortion of the entire evidence on the subject.

If the entire transcript is excluded, plaintiff has failed to prove his contention as to the insufficiency of the preliminary inquiry.

condition, as well as Mr. R. L. Watford, the civilian employee who had the plaintiff's stove repaired by the Fort Stewart Army personnel. But once plaintiff waived trial, the burden was on him to produce the evidence in mitigation or extenuation of the charges. AR 27-10 para. 3-12a provides that the accused member of the Armed Forces has the "right fully to present his case in the presence of the officer who intends to impose the punishment * * * including "the right to call witnesses [and] present evidence." Plaintiff advances no reason why he could not have procured the voluntary attendance of such witnesses at the hearing on his own behalf. He does not contend that they were hostile or would have refused to appear. He simply chose not to call them.[7]

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[7] Plaintiff also argues that had he requested the commanding officer to call the witnesses, the latter would have declined because AR 27-10 para. 3-14b provides that compliance with such request "shall be restricted to those witnesses who are reasonably available as determined within the discretion of the commander imposing Article 15 punishment," and that in determining whether a witness is "reasonably available" the commander imposing Article 15 punishment shall take into consideration that no witness fees will be paid and that the phrase "will ordinarily include those military personnel present for duty at the installation concerned, or those available without the expenditure of travel funds to obtain their presence, and whose attendance will not materially delay the disposition of the proceedings." Plaintiff argues that since the hearing was held at Fort McPherson, Atlanta, Georgia, approximately 250 miles from Fort Stewart, where the four witnesses were located, General Shoemaker would not have called them. However, all four were at "the installation concerned" and hence the commanding general could have exercised his discretion in favor of calling them; but the simple fact is that plaintiff does not allege and the record does not reflect that prior to the hearing he requested that they be called.

Plaintiff contends that General Shoemaker committed reversible error by denying plaintiff access to the details of the preliminary investigation. But the documents produced by defendant in support of its motion for summary judgment, the accuracy of which are not disputed by plaintiff, show that at the times when he initiated and conducted the Article 15 proceeding, the Inspector General's report had not yet been prepared, and General Shoemaker had relied on the oral comprehensive briefing by the Inspector General's investigator, plus four written witness' statements which he had provided to plaintiff and his counsel. (See p. 4, *supra*.) More important, there was no violation of any regulations in failing to furnish what plaintiff contends for, since all that the regulations require is that the commanding officer "notify the member of the nature of the alleged misconduct by a concise statement of the offense in such terms that a specific violation of the code is clearly stated", and that "Any written statements or other documentary evidence pertaining to the case which have been considered by the officer authorized to impose the punishment shall be attached to the file." This was complied with fully.

Plaintiff contends that it was important that he have been informed of the details of the Inspector General's investigation because in his report on the proceedings in connection with plaintiff's appeal General Shoemaker stated that the Inspector General's investigating officer had briefed him on all relevant testimony on five "founded" allegations against plaintiff, and plaintiff had no knowledge of the five allegations which may have

prejudiced General Shoemaker in the punishment he imposed for the two offenses. The obvious response is that General Shoemaker was not influenced by the other allegations because thereafter he decided to initiate proceedings against plaintiff only with respect to the two charges. Finally, the Inspector General's report was furnished to plaintiff on November 20, 1981. If anything in that report showed a violation of plaintiff's constitutional rights or the applicable statute or regulations, plaintiff had ample opportunity to bring it to this court's attention.

Plaintiff further contends that General Shoemaker had decided what punishment he would impose without awaiting plaintiff's hearing, because he read from a yellow sheet of paper previously written out. However, Colonel Patrick A. Tocher, General Shoemaker's staff judge advocate, certified that he had furnished the yellow sheet of paper with a *range* of permissible punishments and a blank space for the one to be chosen, and General Shoemaker at the time he announced the punishment merely filled in the blank space with his choice. Plaintiff has not offered any contrary evidence.

Plaintiff faults General Shoemaker for having attempted to prejudice plaintiff's appeal by writing a memorandum to the appellate officer setting forth his views on the appeal. However, this is not contrary to the regulations, since AR 27-10 para. 3-24 provides that "The office forwarding the appeal may attach thereto any matter in rebuttal of assertions made by the appellant."

. Next plaintiff contends that the affirmance of General Shoemaker's punishment on appeal was faulty because contrary to AR 27-10 para. 3-2b(2). He asserts that that regulation requires referral of an appeal from Article 15 punishment to an officer senior in rank both to the person punished and to the officer imposing the punishment but that MG Hugh J. Clausen, the Judge Advocate General, who affirmed plaintiff's punishment, was junior in rank to both plaintiff and General Shoemaker. Plaintiff is mistaken. AR 27-10, para. 3-2 deals with delegations of Article 15 authority by commanding officers to their own subordinates. The regulation applicable here is AR 27-10, para. 3-22, which provides that "The Secretary of the Army has designated The Judge Advocate General the authority next superior for the purpose of acting on appeals from punishments imposed under Article 15 UCMJ, when there is no intermediate superior authority reasonably available to take this action."

Plaintiff also makes a number of other arguments which in substance assert that General Shoemaker's decision was wrong: namely, that General Shoemaker was predisposed against plaintiff; that plaintiff's trip to West Point by government aircraft was authorized by a travel authorization issued September 30, 1980, allowing him to go anywhere in the United States for purposes of "mission support"; that by Army custom and practice he was entitled to have his wife accompany him on government aircraft without express authorization; and that his wife's mental and physical condition at the time constituted a medical emergency. But all of these contentions are matters that go to the merits of the

commanding officer's findings, which either were argued or could have been argued in the appeal before MG Clausen, the Army Judge Advocate General. Plaintiff has not shown that MG Clausen did not give proper consideration to them on review. Nor does plaintiff deny the truth of General Shoemaker's finding that "As to the misuse of aircraft, MG Cochran testified before me that his actions were admittedly wrong." (See p. 4, *supra.*) As indicated in *Dumas v. United States* and *Hagarty v. United States, supra,* it is not this court's function to review the merits of findings of guilt in Article 15 punishment proceedings, but only the disregard or violation of the Constitution, statute or regulations in the conduct of the proceedings.

Finally, plaintiff contends that he was deprived of his basic rights both under the Constitution and the regulations in that MG Clausen affirmed the punishment in part on the basis of plaintiff having committed an offense with which he was not charged. As discussed earlier (p. 2), General Shoemaker charged plaintiff with and imposed punishment for two offenses: (1) wrongful appropriation of a government aircraft for his personal use; and (2) wrongful diversion of government facilities, property and manpower for the repair of a privately owned stove for plaintiff's boat, in violation of Article 92 UCMJ (10 U.S.C. §892). While MG Clausen affirmed the guilty finding for the first offense without qualification, he affirmed the guilty finding for the second offense only to the extent of "a lesser offense of dereliction of duty, through negligence, in violation of Article 92, UCMJ, by wrongfully accepting a gift from a subordinate * * * and by wrongfully creating the appearance of using public

office for private gain." However, he affirmed the entire punishment without reduction, as just and appropriate for the affirmed offenses.

It was reasonable for the Judge Advocate General to consider negligence in allowing a subordinate to use government facilities and manpower for repairing a general's personal property and thereby wrongfully creating the appearance of using public office for private gain as a lesser version of the charge of *causing* the diversion of government facilities and manpower for such purpose; and, therefore, it was permissible for the reviewing authority to find plaintiff guilty of such lesser offense. But the finding that plaintiff wrongfully accepted a gift (of $50 in repair parts for the stove) from the subordinate does not fit within the scope of the charge against which plaintiff was called to defend himself and to set forth circumstances in mitigation or extenuation thereof prior to imposition of Article 15 punishment. Even if MG Clausen's new findings are supported by "written matters submitted by MG Cochran's attorney which were not available" when General Shoemaker imposed his punishment, as MG Clausen stated in his decision, nothing in the regulations authorizes the reviewing authority to find an appellant guilty of an additional uncharged offense. Accordingly, the finding that plaintiff wrongfully accepted a gift from a subordinate must be vacated.

Since the commanding officer, General Shoemaker, imposed a punishment on plaintiff for two offenses of which only one was fully affirmed on appeal, and since the reviewing authority, the Judge Advocate General,

affirmed the same punishment as just and appropriate for two offenses, of which part of one has been set aside, this matter must be remanded to the Judge Advocate General for reconsideration of his decision as to the appropriateness of the punishment for the offenses which were affirmed by him and not vacated herein.

Accordingly, defendant's motion for summary judgment is denied. On the court's own motion, however, pursuant to Rule 60.1(a)(1), the case is remanded to the Army Judge Advocate General for reconsideration of his decision as to the punishment which is appropriate for plaintiff's offenses, as set forth in this opinion.

Proceedings are suspended for 6 months pending receipt of the Judge Advocate General's decision. Pursuant to Rule 60.1(a)(5), plaintiff's attorney is designated to report to the court at 60-day intervals as to the status of the proceedings on remand. Further proceedings shall be pursuant to Rule 60.1(b).

PHILIP R. MILLER
Philip R. Miller

Opinion and Order of the U.S. Claims Court entered May 27, 1983.

IN THE
UNITED STATES CLAIMS COURT

No. 690-81C

(Filed May 27, 1983)

MAJOR GENERAL (RET.)
JAMES F. COCHRAN, III,

v.

THE UNITED STATES.

Motion for reconsideration; limited scope of review for Article 15 nonjudicial military punishment; no deposition allowable to discover mental processes of commanding officer issuing decision.

Charles M. Jones, Hinesville, Georgia, attorney of record, for plaintiff. *Jeffrey L. Arnold* and *Jones, Osteen, Jones and Arnold,* of counsel.

Michael D. Morin, Washington, D.C., with whom was *Assistant Attorney General J. Paul McGrath,* attorney of record for defendant. *David M. Cohen, Director,* and *Donnie Hoover, Assistant Director,* of counsel.

Appendix—Opinion and Order of the U.S. Claims Court entered May 27, 1983.

ORDER ON PLAINTIFF'S MOTION FOR REHEARING

Plaintiff seeks rehearing of the court's decision which remanded this case to the Army Judge Advocate General for only limited reconsideration of the appropriateness of the punishment to be imposed for plaintiff's offenses. *Cochran v. United States*, 1 Cl. Ct. 759 (1983). For the following reasons, the motion is denied:

Plaintiff contends that affidavits he submitted in opposition to defendant's motion for summary judgment raise factual issues related to his claim that General Shoemaker, the commander who initiated proceedings and conducted the Article 15 nonjudicial hearing,[1] was predisposed against plaintiff and predetermined the punishment. Plaintiff presented the same claim of prejudgment, including the same allegations in support thereof, to Major General (MG) Clausen, the Judge Advocate General, on review of General Shoemaker's decision. In his decision on appeal, MG Clausen stated that he "carefully review[ed] the evidence, which includes written matters supplied by MG Cochran's attorney that were not available when [General Shoemaker] imposed punishment." Plaintiff makes no contention that during the appellate procedure MG Clausen failed to consider the allegations that General Shoemaker had prejudged the issues and predetermined the penalty. Nor does plaintiff argue that MG Clausen himself was predisposed against plaintiff. To the extent that plaintiff's motion raises factual matters related to the claim of bias, such

[1] 10 U.S.C. §815 (1976).

factual disputes are beyond the court's authorized scope of review. As noted in the prior opinion, pursuant to the authority of *Dumas v. United States*, 223 Ct. Cl. 465, 620 F.2d 247 (1980), the court's function in this case is limited to ascertaining whether or not there has been "disregard or violation of the Constitution, statute or regulations in the conduct of the proceedings." *Cochran v. United States, supra*, 1 Cl. Ct. at 770.

Plaintiff next asks the court to reconsider its statement that "plaintiff [does not] deny the truth of General Shoemaker's finding that 'As to the misuse of aircraft, MG Cochran testified before me that his actions were admittedly wrong.' " *Cochran v. United States, supra*, 1 Cl. Ct. at 770. To refute the court's statement plaintiff cites the following averment from his own affidavit:

> Contrary to defendant's assertions, on July 1, 1981, Major General Cochran elected to participate in the Article 15, UCMJ proceeding as to the charges * * * but at no time did he elect to be punished nor did he ever admit any guilt as to the charged offenses.

The court construed this to mean that the *election* to proceed under Article 15 was not an admission of guilt by plaintiff. However, if the statement was intended to have a broader meaning, the decision in this case would still not be changed. Construed as plaintiff urges, the statement simply raises an issue of credibility between plaintiff and General Shoemaker. As discussed herein and in the court's opinion, resolution of such matters was for the military reviewing authorities and not this court. *Dumas v. United States, supra.*

Finally, plaintiff complains that he has not had the opportunity to take the deposition of General Shoemaker. However, absent a strong preliminary showing of bad faith, it is improper to permit inquiry into the mental processes or methods by which an administrative decision maker reached his conclusions. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *United States v. Morgan*, 313 U.S. 409, 421-22 (1941). Plaintiff has failed to make such a showing in this case.

PHILIP R. MILLER
PHILIP R. MILLER
Judge

Opinion and Order of the U.S. Court of Appeals for the Federal Circuit entered March 21, 1984.

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Appeal No. 83-1285

MAJOR GENERAL (RET.)
JAMES F. COCHRAN, III,

Appellant,

v.

THE UNITED STATES,

Appellee.

DECIDED: March 21, 1984

Before DAVIS, SMITH, and NIES, *Circuit Judges.*

SMITH, *Circuit Judge.*

Appendix--Opinion and Order of the U.S. Court of Appeals for the Federal Circuit entered March 21, 1984.

DECISION

In this military discipline case, the judgment of the United States Claims Court, granting in part appellee's (Government) motion for summary judgment, *Cochran* v. *United States*, 1 Cl. Ct. 759 (1983), and subsequently denying appellant's (MG Cochran) motion for rehearing, *Cochran* v. *United States*, 3 Cl. Ct. 3 (1983), is *affirmed.*

OPINION

Initially, we address the Government's contention that this court lacks jurisdiction to review the Claims Court judgment reviewing appellant MG Cochran's collateral attack on his nonjudicial punishment received under article 15 of the Uniform Code of Military Justice, 10 U.S.C. §815 (1982). The Government contends that, because no constitutional or jurisdictional infirmity exists in those claims, jurisdiction is lacking. We disagree. MG Cochran's first claim, an allegation of bias and predisposition on the part of the article 15 decisionmaker, strikes to the heart of the constitutional protection mandated by due process of law. The second claim, alleging that the article 15 appellate decisionmaker lacked authority under the pertinent regulations to review MG Cochran's case, constitutes a direct challenge to that decisionmaker's jurisdiction. We therefore hold that this court may properly review the judgment of the court below, which in turn properly reviewed the collateral attack. *See, e.g., Hagarty* v. *United States*, 449 F.2d 352, 358, 362 (Ct. Cl. 1971); *Dumas* v. *United States*, 620 F.2d 247, 250 (Ct. Cl. 1980).

On the substantive issues, we are not persuaded that the trial court erred with regard to the first claim concerning denial of due process because of alleged bias or predisposition. MG Cochran has made much of the existence of notes on a yellow sheet of paper from which the decisionmaker allegedly read the punishment at the article 15 proceeding. While it is not clear as a factual matter what was written on that paper (*i.e.*, a single punishment or a range of possible punishments), in our view that fact was not "material" such that the Claims Court would be precluded from prohibiting further discovery and granting summary judgment. *Cochran*, 1 Cl. Ct. at 769; Fed. R. Civ. P. 56(c). Judges and administrative decisionmakers may frequently bring to the bench annotated pieces of paper. If this alone were sufficient to create a genuine issue of material fact concerning alleged bias, then the courts would be deluged with such allegations. In any event, as the Claims Court properly held on rehearing, factual matters related to the claim of bias are, as a matter of law, beyond the limited scope of article 15 judicial review. *Cochran*, 3 Cl. Ct. at 4.

MG Cochran has also contended, as regards alleged bias, that the decisionmaker's failure to conduct his own investigation, to interview certain witnesses, and to provide certain information amounts to a showing of bad faith such that, at a minimum, he should have been able to depose that decisionmaker and his staff lawyer. The Claims Court thoroughly considered and rejected these allegations as raised below (*i.e.*, in the context of alleged procedural and regulatory errors). *Cochran*, 1 Cl. Ct. at

766-69. That court again considered and properly rejected these allegations on rehearing as they related to the request for further discovery. *Cochran*, 3 Cl. Ct. at 4. We affirm.

With regard to the second claim, that the appellate decisionmaker MG Clausen lacked authority to review General Shoemaker's decision because the former was not superior in rank to both the latter and MG Cochran, we likewise affirm the Claims Court. For the reasons set forth by that court, MG Clausen was the Judge Advocate General authorized explicitly by the then-applicable regulation to act on article 15 appeals. *Cochran*, 1 Cl. Ct. at 769.

Order of the U.S. Court of Appeals for the Federal Circuit entered April 10, 1984.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

No. 83-1285

MAJOR GENERAL (RET.)
JAMES F. COCHRAN, III,

Appellant,

v.

THE UNITED STATES,

Appellee.

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

FOR THE COURT:
GEORGE E. HUTCHINSON
GEORGE E. HUTCHINSON, *Clerk*

April 10, 1984
Date

cc: Charles M. Jones
Michael D. Morin

Affidavit and Declaration of James F. Cochran, III and William G. Fischer dated August 21, 1982.

IN THE UNITED STATES COURT OF CLAIMS

No. 690-81C

JAMES F. COCHRAN, III,

Plaintiff,

v.

UNITED STATES,

Defendant.

AFFIDAVIT AND DECLARATION

We, JAMES F. COCHRAN, III and WILLIAM G. FISCHER, both being greater than eighteen years of age, make the following sworn statement relating to the civil action styled JAMES F. COCHRAN, III v. UNITED STATES, No. 690-81C, United States Court of Claims, pursuant to 28 U.S.C.A. §1746 and as a sworn statement of fact offer same in opposition to the defendant's Motion for Summary Judgement. I, JAMES F. COCHRAN, III am the plaintiff in this civil action. I, WILLIAM G. FISCHER, as a Major in the United States Army Judge Advocate General's Corps served as Major General James F. Cochran's military counsel during the trial and pendency of the proceedings which are the subject of this civil litigation.

Appendix—Affidavit and Declaration of James F. Cochran, III and William G. Fischer dated August 21, 1982.

During May 1981, Mrs. Faye C. Cochran, wife of plaintiff, now retired Major General James F. Cochran III, was suffering from symptoms of severe depression which had reached crisis proportions which for the Cochran family constituted a severe medical crisis and emergency. In May, 1981 the President of the United States was scheduled to address the graduating corps of West Point cadets among whom were members on orders to the 24th Infantry Division and Major General Cochran's son. The subject matter of his speech was to be focused upon the nation's defense policy and specifically possible future directions. On May 21, 1981, Major General Cochran was the commanding general of Fort Stewart, Hunter AAF and the 24th Infantry Division (mechanized), a vital unit of the Rapid Deployment Force (RDF). The RDF is an essential and integral factor in any consideration of our nation's defense policy and the implementation of the same.

Plaintiff's intent was to fly on May 25, 1981 to Trenton, New Jersey to say farewell to the State Adjutant General and Commanding General of the 50th Armored Division—National Guard Training "Partnership" Unit of the 24th Infantry Division as well as to adjust any final details for the Annual Training 1981 to be held at Ft. Drum, New York and supported by men of the 24th Division.

Mrs. Cochran and Major General and Mrs. Cochran's daughter intended to drive to West Point from Hinesville, Georgia to attend the graduation ceremonies. A rental car was reserved for their use for the drive from Hinesville, Georgia to West Point, New York.

Appendix—Affidavit and Declaration of James F. Cochran, III and William F. Fischer dated August 21, 1982.

In view of the fact that the gist of the President's address was to be upon the national defense policy, Major General Cochran and numerous other Army commanders planned to attend the graduation exercise as unit representatives of their respective commands.

Following graduation and enroute back to Ft. Stewart, Major General Cochran intended to visit Fort Bragg, North Carolina, to say farewell and exit brief General Tackaberry and General Rosenblum.

However, on or about May 23, 1981 Mrs. Cochran, under great stress and suffering from severe depression, informed Major General Cochran she could not make the drive to West Point, New York. Consequently, airline reservations were made for her round trip transportation to New York traveling alone. Mrs. Cochran's condition later aggravated itself to the degree she would not allow herself to be away from Major General Cochran. Major General Cochran, relying upon the previous consultation with his wife's physician, and his personal knowledge of his wife's present state, feared that she might attempt suicide. Major General Cochran understood that his wife was suffering from severe mental depression and was in fact on the verge of a mental breakdown.

At the time for Major General Cochran's trip to West Point, New York, Mrs. Cochran's mental condition worsened. Having consulted Mrs. Cochran's physicians and Army chaplain, and with a belief his wife was suffering a severe medical crisis of emergency proportions, Major General Cochran permitted Mrs. Cochran to accompany him on a military aircraft flight to West Point, New York on May 25, 1981.

Appendix—Affidavit and Declaration of James F. Cochran, III and William F. Fischer dated August 21, 1982

Major General Cochran failed to obtain the permission for his wife to accompany him on the aircraft in contravention of a non-punitive directive or policy which requested that he do so.

On several occasions in the past during his command and with the knowledge of defendant, Major General Cochran had permitted his wife to accompany him on other flights when her presence had been requested by defendant but permission to fly aboard military aircraft had not been obtained prior to her departure. Such practice was known to and permitted by defendant as the requirement to seek permission was a non-punitive policy.

On this particular occasion Major General Cochran felt under the circumstances there was insufficient time to brief the Chief of Staff of the Army as his last minute decision in Major General Cochran's opinion, saved his wife from a mental breakdown and a possible suicide attempt.

Until the aircraft aborted due to mechanical failure, it was Major General Cochran's intent to stop at Ft. Bragg to call on the other general officers.

On June 11, 1981 Major General Cochran was interviewed by Colonel William F. Muhlenfeld and Major Harold J. Gerber, both of whom were from the office of The Inspector General, Department of the Army. Major General Cochran informed these gentlemen of the nature of his wife's mental and physical condition and advised them these facts could be verified by them communicating with his wife's chaplain and her physician. These two gentlemen, who represented they

were fact finders, chose not to talk to the chaplain, or the physician or his aide notwithstanding Major General Cochran's suggestion.

In March of 1981, Mr. R. L. Watford, a personal friend of Major General Cochran, agreed to repair a small portable alcohol boat's stove belonging to Major General Cochran. Major General Cochran did not know the nature of the repairs needed, the costs of materials, or the extent of work necessary. Mr. R. L. Watford is a hunting friend of Major General Cochran who had before this incident been the recipient of an expensive prized hunting dog. Major General Cochran gave the dog to Mr. R. L. Watford because he felt the dog needed a home in the country and required training with a greater amount of frequency than the schedule of a commanding general of an Infantry Division could sacrifice. Mr. R. L. Watford and Major General Cochran had a special friendship connected by their mutual attraction to the outdoors and hunting. This relationship was unrelated to and outside of their respective government positions. There is additional evidence which could and would have been presented if Major General Cochran had been given notice of the charges against him.

Unbeknown to Major General Cochran, after Mr. R. L. Watford was unsuccessful at repairing the stove himself with parts he purchased from a hometown service station, Mr. Watford took the stove and parts to various personal friends of his on Ft. Stewart and had the stove repaired. Mr. R. L. Watford later delivered the stove to Major General Cochran's residence. No one was at home at the time it was delivered.

Appendix—Affidavit and Declaration of James F. Cochran, III and William F. Fischer dated August 21, 1982.

Major General Cochran did not have any knowledge or inclination the stove was repaired by anyone on Ft. Stewart. At the time the stove was delivered he did not know if any parts had been purchased, but he had been led to believe the stove was repaired using spare parts at the home of Mr. R. L. Watford in Ludowici, Long County, Georgia, located approximately twenty miles away from Ft. Stewart.

Major General Cochran has never been asked to explain his friendship with Mr. R. L. Watford and how it relates to the small boat's stove being repaired by Mr. Watford. At no time has Major General Cochran been asked nor given an opportunity to explain the circumstances which justify his receipt of work and materials of a nominal value from Mr. R. L. Watford. Contrary to defendant's contention that Major General Cochran has not paid Mr. R. L. Watford for the work done to and materials required for Major General Cochran's stove, Major General Cochran has not been asked nor given an opportunity to state whether Mr. R. L. Watford received any consideration for the work completed and materials acquired for the repairs.

Notwithstanding repeated requests for such, at no time has anyone on behalf of defendant contacted or communicated with Mr. R. L. Watford. There are no outstanding investigations or charges pending against Mr. R. L. Watford nor has there been any determination of pecuniary or criminal responsibility levied against Mr. R. L. Watford.

On June 23, 1981, General Robert M. Shoemaker, Commander, United States Army Forces Command,

initiated nonjudicial punishment proceedings under Article 15 of the Uniform Code of Military Justice (UCMJ) against Major General James F. Cochran. Major General Cochran was notified that the two charges being considered were that he did:

(1) On or about 25 May 1981, wrongfully appropriate a U-21 aircraft, property of the United States, by directing that it be flown to Newburgh, New York, and return for your own personal benefit, in violation of Article 121, UCMJ; and

(2) In or about March 1981, violate a lawful general regulation, to wit: para 2-4, AR 600-50, dated 20 October 1977, by causing a diversion of Government facilities property, and manpower for the repair of a privately owned stove for your boat, in violation of Article 92(1), UCMJ.

Contrary to defendant's assertions, on July 1, 1981, Major General Cochran elected to participate in the Article 15, UCMJ proceeding as to the charges noted above but at no time did he elect to be punished nor did he ever admit any guilt as to the charged offenses.

A hearing was held shortly thereafter in the office of General Shoemaker at FORSCOM Headquarters, Ft. McPherson, Atlanta, Georgia. Major General Cochran was accompanied by his military defense counsel, Major William G. Fischer.

Contrary to defendant's contention, Major General Cochran pleaded not guilty to all charges and specifications. Major General Cochran stated he was justified in having his wife accompany him because of her mental and physical condition but that he was guilty

of an error in judgment by failing to follow the nonpunitive policy of phoning for authorization of spousal travel from the Office of the Chief of Staff, United States Army. A policy, which he noted based upon his past experiences with defendant was set out in print, but frequently was modified in actual practice.

The question of whether under the circumstances Major General Cochran knew or should have known his position as Commanding General of Ft. Stewart would cause his boat stove to be converted with government resources was neither mentioned or discussed. During the hearing only *where* the boat stove repair took place was discussed, never *why* the boat stove was repaired was mentioned.

Prior to the commencement of the hearing, Major General Cochran and Major Fischer noticed General Shoemaker had a piece of paper on the desk in front of him which had written out on it only the words "Forfeiture of $2,000; and to receive a written reprimand."

During the course of the hearing when requested by General Shoemaker whether Major General Cochran had any matters in defense, extenuation or mitigation to present, Major General Cochran requested copies of all written reports considered by General Shoemaker to include any and all reports written or otherwise which had been rendered by the Inspector General's Office and which served as a basis for the charged offenses. Additionally, Major General Cochran requested that General Shoemaker speak with Dr. Alcide M. Lanoue, a Harvard and Yale educated physician who also

commands the Ft. Stewart Army Hospital, and who was personally familiar with Mrs. Cochran's physical and mental condition. Further, Major General Cochran requested that General Shoemaker speak with the Army chaplain caring for Mrs. Cochran as well as his aide who was familiar with the circumstances surrounding the necessary last minute determination to allow Mrs. Cochran to accompany Major General Cochran on the flight to New York in an effort to avoid further deterioration of her mental state and physical health. All of these requests had been made at various times previously and all of these requests were refused or ignored.

Major General Cochran requested that the hearing not be open, but instead it should be private consideration, especially in view of the nature of the matters presented. General Shoemaker, subsequently and over Major General Cochran's express objections made prior thereto, issued a written press release to the national wire services as to the Article 15, UCMJ proceeding notwithstanding an added warning from plaintiff such matters were not proper for release to the national wire services.

General Shoemaker announced the punishment, "Forfeiture of $2,000; and to receive a written reprimand."

On August 5, 1981, Major General Cochran, through civilian counsel and his military counsel, filed with General Shoemaker a request for reconsideration.

General Shoemaker denied the request for reconsideration without yet consulting any of the requested witnesses.

Appendix—Affidavit and Declaration of James F. Cochran, III and William F. Fischer dated August 21, 1982.

On July 27, 1981 General Shoemaker denied Major General Cochran's request for the reports prepared by the Inspector General which were the basis of General Shoemaker taking action against Major General Cochran and the apparent basis of General Shoemaker's determination that Major General Cochran was guilty of five "founded" allegations of which General Shoemaker never gave Major General Cochran notice.

On August 13, 1981, General Shoemaker forwarded plaintiff's appeal to the Judge Advocate General, Major General Hugh J. Clausen, for appellate consideration, recommending that the appeal be denied. In his forwarding letter and for reasons totally unknown to Major General Cochran, General Shoemaker informed Major General Clausen that he received a comprehensive briefing concerning all relevant testimony on five "founded" allegations by the investigating officer, General William F. Muhlenfeld. Major General Cochran has never been informed as to the nature of the briefing, the five "founded" allegations or the relevance of such a comment other than to show the prejudice and predisposition of General Shoemaker against Major General Cochran.

Major General Hugh J. Clausen at the time was inferior in rank to the person against whom the Article 15, UCMJ was being imposed as well as being inferior in rank to the person imposing the Article 15, UCMJ.

Major General Clausen took action on Major General Cochran's appeal. Without affording Major General Cochran an opportunity to defend against the new charge, Major General Clausen affirmed General

Shoemaker in part and reversed him in part. He affirmed the violation under Article 121, UCMJ, concerning the personal use of a military aircraft. He found Major General Cochran not guilty of the diversion of government resources but found him guilty of dereliction of duty, through negligence, by wrongfully accepting a gift from a subordinate DAC and by wrongfully creating the appearance of using public office for private gain.

Major General Cochran advised Major General Clausen the information contained in the documents submitted to Major General Clausen could and would be confirmed by the same various witnesses requested of General Shoemaker to interview. Although within the appellate authority's reviewing authority, Major General Clausen elected not to interview any witnesses or to gather additional information.

Major General Cochran reserved the right to supplement his brief upon receipt of a copy of The Inspector General's investigation which served as a basis for the briefing and apparent five "founded" allegations against Major General Cochran of which he did not have knowledge or notice.

On August 31, 1981 Major General Clausen took final action on the appeal of Major General Cochran.

On September 25, 1981 Major General Cochran acknowledged seeing the action taken on appeal.

On July 16, 1981 Lieutenant General Richard G. Trefry, The Inspector General, denied Major General Cochran's request for a copy of The Inspector General's investigation which served as a basis for the briefing to

Appendix—Affidavit and Declaration of James F. Cochran, III and William F. Fischer dated August 21, 1982.

General Shoemaker on the charges alleged which may or may not be included among the five "founded" allegations, General Shoemaker considered Major General Cochran guilty but of which he did not give Major General Cochran knowledge or notice.

On August 3, 1981 Isaac C. Hunt, Jr., Principal Deputy, denied on behalf of the Secretary of the Army, Major General Cochran's repeated request for a copy of the Inspector General's investigation which served as a basis for the briefing to General Shoemaker on the charged offenses which may or may not be included among the five "founded" allegations General Shoemaker considered Major General Cochran guilty but of which he did not give Major General Cochran information or notice of.

Finally and after yet another request, on November 20, 1981 Major General Robert B. Solomon, the acting Inspector General, determined that then retired Major General Cochran could receive edited portions of The Inspector General's investigation which served as a basis for the briefing of General Shoemaker on the charges alleged which may or may not be included among the five "founded" allegations which General Shoemaker considered Major General Cochran guilty, but of which he did not and has never given Major General Cochran information or notice. Said permission was conditional upon Major General Cochran first paying $48.70 to the MDW Finance and Accounting officer.

On November 27, 1981 Major General Cochran filed this suit. Understanding review by the Army Board for Correction of Military Records (ABCMR) is permissive

not mandatory, Major General Cochran elected not to request further assistance and review from a designee, agency or board of the Secretary of the Army, and instead to seek redress before a civilian tribunal unassociated with The Secretary of the Army or the Department of the Army.

We, individually, declare and state under penalty of perjury that the foregoing is true and correct.

Executed on the 21st day of August, 1982 in the United States of America.

JAMES F. COCHRAN, III
James F. Cochran, III

WILLIAM G. FISCHER
William G. Fischer
Major, JAGC USA

Sworn and subscribed before me this 21st day of August, 1982.

MARIE G. HUNTER
(Seal) *Notary Public,*
Georgia, State at Large
My commission expires: 1-28-84